

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEPHEN L. BRAGA
700 12th Street, NW
Suite 900
Washington, D.C. 20005

Plaintiff,

v.

FEDERAL BUREAU OF INVESTIGATION
935 Pennsylvania Ave, NW
Washington, DC 20535

Defendant.

Civil Action No. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as amended, challenging the failure of the Federal Bureau of Investigation ("FBI") to adequately search for and release records responsive to numerous FOIA requests made by Stephen L. Braga ("Braga") concerning the FBI's involvement in, and communications concerning, the State of Arkansas' investigation, prosecution and conviction of Damien Echols, Jason Baldwin, and Jessie Misskelley in the so-called West Memphis Three case.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B).
3. Venue in this Court is proper under 28 U.S. C. § 1391(e).

PARTIES

4. Plaintiff Braga is a lawyer with his principal place of business in the District of Columbia. Braga represents Damien Echols, one of the West Memphis Three defendants. As part of his efforts to assist Echols in challenging the wrongfulness of his conviction and sentence to death, Braga made the FOIA requests at issue herein to the FBI.

5. Defendant FBI is a federal agency in control of records responsive to Braga's FOIA requests.

STATUTORY FRAMEWORK AND FACTS GIVING RISE TO PLAINTIFF'S CLAIMS

A. The Freedom of Information Act

6. FOIA was enacted "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." S. Rep. No. 813, at 3 (1 Sess. 1965). See also Department of Justice v. Tax Analysts, 492 U.S. 136, 142 (1989); Dept. of the Air Force v. Rose, 425 U.S. 352, 361 (1976). "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." John Doe Agency v. John Doe Corp., 493 U.S. 146, 152 (1989). FOIA was enacted to "permit access to official information long shielded unnecessarily from public view" by creating a "right to secure such information from possibly unwilling official hands." Environmental Protection Agency v. Mink, 410 U.S. 73, 80 (1973). "[D]isclosure, not secrecy, is the dominant objective of the Act." Id.

7. Upon request, FOIA requires agencies of the federal government to conduct a reasonable search for, and to release, records to the public, unless one of nine specific statutory exemptions applies. 5 U.S.C. § 552(b). The exemptions must be narrowly construed. If an

exemption applies, the agency is required to disclose “any reasonably segregable portion of the record” containing the exempt material. Id.

8. Under FOIA Exemption 6, records or portions of records may be withheld if they contain “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Id. § 552(b)(6) (emphasis added). The use of the phrase “clearly unwarranted” mandates that this exemption only apply when a balancing of the individual’s right of privacy substantially outweighs the basic purpose of FOIA, which is to open agency action to the light of public scrutiny.

9. FOIA Exemption 7C is the law enforcement counterpart to Exemption 6. Under Exemption 7C, records or portions of records may be withheld if they contain “law enforcement information the disclosure of which could reasonably be expected to constitute an unwarranted invasion of personal privacy.” Id. § 552(b)(7)(C) (emphasis added). The use of the term “unwarranted” mandates that this exemption only apply when an individual’s right of privacy outweighs the basic purpose of FOIA, which is to open agency action to the light of public scrutiny.

10. Finally, under FOIA Exemption 7D, records or portions of records may be withheld if they contain “information compiled for law enforcement purposes and could reasonably be expected to disclose the identity of a confidential source.” Id. § 552(b)(7)(D). The applicability of this exemption turns on its premise of source confidentiality, which is to be determined on a case-by-case basis. See Department of Justice v. Landano, 508 U.S. 165, 179-180 (1993).

B. Facts

11. The West Memphis Three case is one of the most high-profile and controversial cases of apparent miscarriage of justice in the history of this country's criminal justice system. Four movies have been made about the case: Paradise Lost 1, Paradise Lost 2, Paradise Lost 3 and West of Memphis. Two books have been written about the case: Devil's Knot and Blood of the Innocents. Too many other multimedia reports about the case – from newspaper articles to television shows to internet communications – have been generated to even be counted. Braga's client, Echols, was sentenced to death in the case. The West Memphis Three defendants maintained their innocence for eighteen years and this past August they were all released from prison as part of a deal to bring the bitterly disputed case to a close. At that time, the New York Times reported that Echols was the highest-profile inmate released from death row in recent memory. The FBI played a role in the investigation and/or prosecution of the West Memphis Three defendants.

12. There are four separate FOIA requests at issue in this action, as detailed below.

The First FOIA Request (No. 1163053-000)

13. On March 17, 2011, Braga sent a FOIA request to the FBI requesting:

copies of all records relating to the FBI's involvement with the West Memphis Police Department in West Memphis, Arkansas in an investigation into the murders of three young boys named Steven Branch, Michael Moore and Christopher Byers on May 5, 1993. The FBI was contacted about the murders by teletype dated May 7, 1993 and . . . the FBI's Universal File Case Number for this matter was 252B-LR-34807. The requested records include any FBI interactions with any other law enforcement or forensic agencies such as the Arkansas State Police and the Arkansas State Crime Laboratory concerning this investigation. The requested records include any FBI interactions with any law enforcement or forensic agencies, or prosecutor's office, with respect to either (1) the prosecution of Damien Echols, Jason Baldwin and/or Jessie Misskelley for these murders, or (2) any post-conviction legal proceedings involving Echols, Baldwin or Misskelley. Finally, the

requested records include (1) the nature and results of any scientific tests conducted by the FBI on any forensic evidence, (2) identification of any forensic evidence that remains in the FBI's possession today, and (3) transmittal letters received from or sent to the WMPD and/or any other law enforcement or forensic agencies with the transmission of any evidence relating to this investigation and/or prosecution.

In this FOIA request ("FOIA Request No. 1"), Braga identified himself as "an attorney representing Damien Echols in post-conviction litigation in the Arkansas State Courts" and advised the FBI that "[t]he requested information is pertinent to certain issues to be addressed by the Arkansas Circuit Court at an evidentiary hearing later this year on Mr. Echols' motion for a new trial based on newly discovered evidence."

14. On March 24, 2011, the FBI responded to FOIA Request No. 1 by advising Braga that: "The records that you have requested were previously processed under the provisions of the [FOIA] for another requester. If you would like the documents to be reprocessed under the new Attorney General guidelines, please submit a new FOIA request. Enclosed are 190 pages of documents pertaining to your request and a copy of the explanation of exemptions." As justification for withholding documents, and portions of documents, from production, the FBI claimed that FOIA exemptions 6, 7C and 7D applied to that information.

15. On April 4, 2011, Braga wrote back to the FBI concerning its response to FOIA Request No. 1, stating in pertinent part:

I have a couple of questions concerning the documents you sent me. I am hoping that you can answer these questions promptly so that I can meaningfully determine whether I need to appeal.

One of the documents illustrates a VHS tape of the 'Crime Scene Video.' Is there a way for me to get a copy of that tape made, at my expense, of course?

Another document refers to '3 large maps of crime scene' which were 'too large to scan.' Is there a way for me to get copies of those large maps made, again at my expense?

Other than the foregoing tape and maps, the only reference to any documents being withheld in their entirety – as opposed to documents being provided with redactions – are ‘the medical examiner reports on the 3 boys.’ Am I right that no other documents have been withheld in their entirety?

The documents produced contain no references to any forensic testing of evidence done by the FBI. Was no such forensic testing done, or would it have been done in a unit of the Bureau covered by a different FOIA system, so that I would need to send a new request there?

(Emphases added).

16. Unfortunately, the FBI never responded to the questions raised in Braga’s April 4 letter.

17. By letter dated May 11, 2011, Braga filed an administrative appeal of the FBI’s response to FOIA Request No. 1. See Exhibit 1. In that appeal, Braga noted the following:

I have obtained a number of other FBI documents relating to the subject matter of my FOIA request which are not included within the 190 pages of documents provided to me with the [FBI’s] FOIA response. A sampling of those non-produced documents are attached hereto as Exhibit D. Accordingly, I can only conclude that the search for documents responsive to my FOIA request was inadequate.

In addition, based upon my review of the redactions to the documents which have been produced, it appears that the b6 and b7(C) exemptions have been applied far too broadly, especially given that the general subject matter of the documents has been a subject of public court proceedings for most of the past 17 years.

Finally, I do think that I am entitled to answers to the questions I posed . . . in my April 4 letter, in order to meaningfully exercise my FOIA rights.

18. By letter dated November 9, 2011, the FBI denied Braga’s appeal of its response to FOIA Request No. 1. The FBI’s appeal officer “determined that the FBI conducted an adequate, reasonable search for records responsive to [Braga’s] request” and concluded that “the

FBI properly withheld certain information that is protected from disclosure under” exemptions 6, 7C and 7D. The FBI appeal officer also indicated that the FBI was going “to reprocess certain records, including the videotape . . . reference[d] in [Braga’s] April 4, 2011 letter to the FBI.” Finally, the FBI appeal officer “advised that no forensic testing records were withheld; rather, no such responsive records were located in file number 252B-LR-34807.” (Emphasis added).

The Second FOIA Request (No. 1164075-000)

19. On April 4, 2011, Braga sent a second FOIA request to the FBI seeking:

All records relating to communications to the FBI, or from the FBI, between January 1, 2000 and April 4, 2011 relating to FBI File Number 252B-LR-34807. In this request, communications includes correspondence, e-mails, text messages, phone messages, voice mail messages, teletypes, facsimiles, memoranda or other communication of any kind, directly or indirectly sent to or from the FBI. This request also includes records of communications which are merely copied to or by the FBI in any form, either expressly or covertly.

Once again, Braga also advised the FBI that he was an attorney “represent[ing] Damien Echols, one of the three young men convicted as a result of the investigation of the crimes referenced in the specified file.”

20. By letter dated June 8, 2011, the FBI responded to FOIA Request No. 2. The FBI informed Braga that it had reviewed 51 pages of records and was releasing 26 of those pages pursuant to this FOIA request. The remaining 25 pages were being withheld from release under FOIA exemptions 6, 7C and/or 7D. The twenty-six pages released by the FBI were comprised of one two-page letter containing various redactions made under FOIA exemptions 6 and 7C and 24 pages of maps.

21. By letter dated July 5, 2011, Braga appealed the FBI’s response to FOIA Request No. 2. See Exhibit 2. In that appeal, Braga stated:

The information contained in, and accompanying, [the FBI's] FOIA response indicates that 25 pages of responsive documents have been withheld in full on the basis of FOIA exemptions (b)(6), (7)(C) & (7)(D). In my experience, these exemptions are rarely invoked to protect entire documents, but are rather utilized to justify limited redactions from documents in order to fulfill the purposes of the exemptions in balance with the FOIA's otherwise broad mandate of public disclosure. Indeed, that is precisely the manner in which these same exemptions were invoked on portions of the 26 pages of documents which were released in response to this FOIA request. Thus, it appears that these exemptions have been applied far too broadly, especially given that the general subject matter of the documents has been a subject of public court proceedings for most of the past 17 years.

22. By letter dated September 21, 2011, the FBI appeal officer "affirm[ed], on partly modified grounds, the FBI's action on [this FOIA] request." The modification was rejecting any reliance on FOIA exemption 7D as a ground for withholding any of the information requested, and relying exclusively instead on exemptions 6 and 7C.

The Third FOIA Request (No. 1166585-000)

23. On May 11, 2011, Braga sent a third FOIA request to the FBI seeking:

All records relating to the FBI's testing and/or analysis of soil, fiber, hair, blood, tissue, semen, clothing, polygraph examinations or other evidence in connection with (1) the investigation of the murders of Steven Branch, Christopher Byers and Michael Moore on May 5, 1993 in West Memphis, Arkansas; (2) the 1994 prosecutions of Jessie Misskelley, Damien Echols and Jason Baldwin for the murders referenced above; and/or (3) any post-conviction proceedings in the Misskelley, Echols or Baldwin cases. This testing and/or analysis was likely requested by the West Memphis Police Department, the FBI Field Office in Little Rock, Arkansas and/or the Arkansas Attorney General's Office. FBI File Number 252B-LR-34807 was opened in response to early communications about this case.

24. By letter dated May 23, 2011, the FBI responded to FOIA Request No. 3. The FBI's response simply advised Braga as follows: "By letter dated March 24, 2011, records responsive to your request were reviewed and 190 pages were released to you in FOIA #

1163053. The records you currently seek have already been properly reviewed and withheld [pursuant] to the provisions of the Freedom of Information [Act].”

25. By letter dated June 10, 2011, Braga appealed the FBI’s response to FOIA Request No. 3. See Exhibit 3. In that appeal, Braga argued:

The May 11 FOIA request that is the subject of this appeal was specifically drafted to cover FBI evidence testing records from May 5, 1993 through May 11, 2011 in connection with the referenced cases. . . . [T]he March 24 FOIA response plainly did not address all of such records so simply referring back to that as a means of responding to the May 11 FOIA request is patently insufficient. In addition, the time period covered by the May 11 request is also broader than the time period covered by the document production made on March 24 so – again – simply referring back to that production as a means of responding to the May 11 FOIA request is also patently insufficient.

26. By letter dated November 9, 2011, the FBI appeal officer “affirm[ed] the FBI’s action on [this FOIA] request. It did so because, according to the appeal officer, “the FBI has processed all records pertaining to File No. 252B-LR-34807, which encompasses all records related to both of your requests.” (emphasis added).

The Fourth FOIA Request (No. 1163053-001)

27. On June 24, 2011, Braga sent a fourth FOIA request to the FBI. This FOIA request simply asked the FBI to “reprocess” FOIA Request No. 1 “under the new Attorney General guidelines” as indicated in the FBI’s March 24, 2011 letter discussed in Paragraph 14 above.

28. By letter dated November 1, 2011, the FBI responded to FOIA Request No. 4. In that response, the FBI informed Braga that “697 pages were reviewed and 458 pages are being released.” The remaining 239 pages were being withheld from release under FOIA exemptions

6, 7C and/or 7D, while the 458 pages released by the FBI also contained various redactions made under those same FOIA exemptions.

29. By letter dated December 7, 2011, Braga appealed the FBI's response to FOIA Request No. 4. See Exhibit 4. In that appeal, Braga maintained that:

[d]espite the new guidelines and the reprocessing, 239 pages of responsive records have still been withheld from disclosure and the pages which have been produced are still subject to too many redactions under FOIA exemptions 6, 7C and 7D. Thus, it appears that these exemptions have been applied far too broadly, especially given that the general subject matter of the documents has been a subject of public court proceedings for most of the past 17 years.

30. To date, the FBI has still not decided Braga's December 7 appeal, thereby constructively exhausting and denying that appeal. See 5 U.S.C. § 552(a)(6)(C); Nurse v. Secretary of the Air Force, 231 F. Supp. 2d 323, 328 (D.D.C. 2002).

PLAINTIFF'S CLAIMS FOR RELIEF

31. As detailed above, Braga has fully exhausted all administrative remedies with respect to FOIA Requests Nos. 1, 2 & 3, and he has constructively exhausted all administrative remedies with respect to FOIA Request No. 4.

32. The FBI has demonstrably failed to conduct an adequate search for records responsive to Braga's FOIA requests. For example, Exhibit D attached to Exhibit 1 to this Complaint contains copies of FBI documents responsive to one or more of Braga's FOIA requests. Yet these documents were NOT produced by the FBI in response to any of Braga's FOIA requests. We have possession of many other similar records as well. In response to FOIA Request No. 3, the FBI asserted that "the FBI has processed all records pertaining to File No. 252B-LR-34807, which encompasses all records related to both of your requests." (emphasis added). However, the documents produced in response to FOIA Request No. 4 reveal that "on

December 29, 1993” this case “formerly classified as 252B-LR-34807” was “reclassified . . . as 62D-LR-34807.” Has this reclassified file been searched? We have no indication that it has been, but it should be. Maybe the missing documents are there, rather than simply and unfathomably absent from the FBI’s files. See Oglesby v. Department of the Army, 920 F.2d 57 (D.C. Cir. 1990)(“agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested”); accord, Campbell v. Department of Justice, 164 F.3d 20 (D.C. Cir. 1998).

33. The FBI has wholly failed to offer any context for its Exemption 6 assertions, thus leaving Braga only to guess at: why the FBI determined that it could not redact and release reasonably segregable portions of many full documents while still protecting the asserted privacy interests, and how the FBI conducted its weighing of these asserted privacy interests against the public interest in disclosure. Each of the FBI’s information withholdings under Exemption 6 are denoted by a simple parenthetical or note saying “b6” – with no further explanation. But certainly some additional justification of the relevant privacy interest and its balancing against the public interest should be required here. As the D.C. Circuit has recognized, “in recent years, high-profile exonerations of death-row inmates have generated considerable public interest in the potential innocence of individuals sentenced to death.” Roth v. Department of Justice, 642 F.3d 1161 (D.C. Cir. 2011) (emphasis added).

34. The FBI has wholly failed to offer any context for its Exemption 7C assertions, thus leaving Braga only to guess at: why the FBI determined that it could not redact and release reasonably segregable portions of many full documents while still protecting the asserted privacy interests, and how the FBI conducted its weighing of these asserted privacy interests against the public interest in disclosure. Each of the FBI’s information withholdings under Exemption 7C

are denoted by a simple parenthetical or note saying “b7C” – with no further explanation. But certainly some additional justification of the relevant privacy interest and its balancing against the public interest should be required here. See Roth v. Department of Justice, *supra*.

35. The FBI has wholly failed to offer any context for its Exemption 7D assertions, thus leaving Braga only to guess at: how the FBI determined in each instance that the withheld information could reasonably jeopardize a confidential source’s identity. Each of the FBI’s information withholdings under Exemption 7D are denoted by a simple parenthetical or note saying “b6” – with no further explanation. But certainly some additional justification of the circumstances warranting confidentiality are required when so many of these claims seem to cover communications with the very publicly known West Memphis Police Department, which was leading this investigation. As the Court found in Lazaridis v. Department of Justice, 766 F. Supp. 2d 134 (D.D.C. 2011): “Exemption 7(D) seems inapplicable to this information because the FBI’s source – the Ottawa County Sheriff’s Department – is identified, and, thus, not confidential.”

36. Overall, the only fair conclusion that can be drawn from the manner in which the FBI has responded to Braga’s FOIA requests is that it has done so grudgingly, rather than fulsomely as the FOIA requires. For example, Braga has still not received a single frame of video from the “Crime Scene” videotape the FBI promised to reprocess in Paragraph 18 above. Can it really be that the entirety of a public crime scene is exempt from disclosure under the FOIA? Of course not. Information in the “public domain” is typically NOT exempt from disclosure under FOIA. Cottone v. Reno, 193 F.3d 550 (D.C. Cir. 1999). So where is the videotape?

37. By failing to search for and provide all records responsive to Braga's FOIA requests, failing to segregate responsive records as required to provide non-exempt information, and unlawfully withholding responsive records under overbroad assertions of the three cited FOIA exemptions, Defendant FBI is violating the FOIA.

38. Under the FOIA, Braga has a right to obtain the requested records.

Wherefore, Plaintiff respectfully requests that this Court:

- A. declare Defendant in violation of the FOIA;
- B. order Defendant to release to Plaintiff within twenty days all records responsive to Braga's FOIA requests previously withheld on exemption grounds;
- C. order Defendant to (1) conduct an additional reasonable search for all records responsive to Braga's FOIA requests, including – but not necessarily limited to – records within the reclassified FBI File No. 62D-LR-34807, within twenty days, and (2) to release to Plaintiff all additional non-exempt records, and parts of records, found as a result of the foregoing search within twenty days thereafter;
- D. award Plaintiff costs and attorneys' fees; and
- E. award Plaintiff such other and further relief as the Court may deem just and proper.

Respectfully submitted,



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